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NO. 88-7351

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JEFFREY ALAN WALTON,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

(9)

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QUESTIONS PRESENTED FOR REVIEW

1. Does Arizona's death penalty statute violate the Sixth Amendment by denying a jury trial on aggravating circumstances necessary for the imposition of death?

2. Does Arizona's death penalty statute violate the Eighth and Fourteenth Amendments by requiring the trial court to impose the death penalty if it finds that the defendant has failed to prove the existence of mitigating evidence sufficient to call for leniency?

3. Has Arizona's death penalty aggravating factor of "especially heinous, cruel or depraved" been sufficiently defined to satisfy the requirements of Maynard v. Cartwright, ___ U.S. ___, 108 S. Ct. 1853 (1988)?

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OPINION BELOW

The Arizona Supreme Court held: (1) Arizona's death penalty statute does not violate the Sixth Amendment right to a jury trial by requiring the trial court to determine the existence of aggravating factors necessary for the imposition of capital sentencing; (2) Arizona's death penalty statute does not create an unconstitutional mandatory death sentence by requiring the defendant to prove the existence of mitigating evidence sufficient to call for leniency; and (3) Arizona courts have sufficiently defined the aggravating factor of "especially heinous, cruel or depraved." State v. Walton, ___ Ariz. ___, 769 P.2d 1017, 1030 (1989).

STATEMENT OF JURISDICTION

On January 27, 1987, a Pima County Superior Court judge found insufficient mitigating evidence to call for leniency given the aggravating circumstances, and sentenced Jeffrey Alan Walton to death. On February 2, 1989, the Arizona Supreme Court affirmed the conviction and sentence. State v. Walton, ___ Ariz. ___, 769 P.2d 1017 (1989). Walton filed a timely motion for reconsideration, which was denied by the Arizona Supreme Court on March 22, 1989. On May 20, 1989, Walton filed a timely petition for writ of certiorari with this Court. This Court has jurisdiction to entertain the petition pursuant to United States Constitution Article III, § 2; 28 U.S.C. § 1254(1), and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS, STATUTES AND TREATIES INVOLVED

The pertinent portion of the Sixth Amendment to the United States Constitution provides:

> [T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The pertinent portion of the Eighth Amendment to the United States Constitution provides:

[N]or cruel and unusual punishments inflicted.

The pertinent portion of the Fourteenth Amendment to the United States Constitution provides:

[N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

Applicable Arizona statutes involved are:

13-1105. First degree murder; classification

A. A person commits first degree murder if:

1. Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or

2. Acting either alone or with one or more other persons such person commits or attempts to commit sexual conduct with a minor under section 13-1405, sexual assault under section 13-1406, molestation of a child under section 13-1410, narcotics offenses under section 13-3408, subsection A, paragraph 7 or section 13-3409, kidnapping under section 13-1304, burglary under section 13-1506, 13-1507 or 13-1508, arson of an occupied structure under section 13-1704, robbery under section 13-1902, 13-1903 or 13-1904, escape under section 13-2503 or 13-2504 or child abuse under section 13-3623, subsection B, paragraph 1, and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

B. Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by section 13-703.

13-703. Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances

A. A person guilty of first degree murder as defined in section 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in section 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at

the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or

persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

STATEMENT OF FACTS

On March 2, 1986, Thomas Powell, a young Marine on leave, borrowed his mother's car for the evening. On that same day, petitioner asked Sherold Ramsey and Robert Hoover to help him rob an old drunk, tie him up, and leave him in the desert. Ramsey and Hoover agreed to the idea, and left their trailer with petitioner. The three traveled to a swap meet in Tucson and proceeded to fulfill their objectives. Eventually, the trio arrived at a bar and began to wait for their old, drunk victim.

Thomas Powell left the bar and headed towards his mother's car. Hoover whistled to let petitioner know that someone was coming. Powell proceeded around a van where he was confronted by petitioner, who cocked his gun and ordered Powell to empty his pockets and place the contents on top of his car. Powell complied with petitioner's demands and then laid down on the ground. Powell was then ordered off the ground and petitioner gave Powell's car keys to Hoover to drive.

Petitioner put Powell in the back seat and Hoover drove Powell's vehicle. The four proceeded out of Tucson to a desert location known as Gates Pass. While driving to the desert, petitioner and Hoover engaged in conversation with

Powell, asking him where he lived and if he had any more money. Powell indicated that he lived in the area, but that he did not have any more money, as he had given his mother money for his sister's rent.

Upon their arrival at Gates Pass, petitioner and Hoover got out of the car and began arguing about what to do with Powell. Eventually, Hoover stated he did not care what petitioner did with Powell. Whereupon, petitioner told Hoover and Ramsey to turn up the car radio. Petitioner then took Powell out in the desert and shot him in the head. Powell died several days later.

Petitioner returned to the stolen vehicle and informed his accomplices that it was loud, "it sounded like a rifle." The three then proceeded to a "Carl's Jr.," and bought hamburgers with the money taken from Powell. At the trailer, petitioner stated to Ramsey and Hoover that he should have checked Powell for a pulse, but petitioner was sure the victim was dead because he shot him in the head. Petitioner boasted that he never saw a "man pee his pants before." After finishing his burger, petitioner wiped the fingerprints off the car and parked the car in a bowling alley parking lot.

On Wednesday, March 5, 1986, Hoover and Ramsey left Tucson in Powell's car and went to California. Prior to leaving, petitioner, Hoover, and Ramsey went to David Bilodeau's house to find some dynamite to destroy the car. Petitioner told Bilodeau that he had shot someone and he needed some dynamite to get rid of the car. Petitioner informed Bilodeau that the man he shot was someone from the armed services and that he had shot him in the head. Petitioner stated that the shooting took place at Gates Pass and showed Bilodeau the gun. Bilodeau told petitioner

that he did not have any dynamite, and petitioner left. Bilodeau then telephoned the police and informed them what had happened.

On December 16, 1986, the jurors found petitioner guilty of first-degree murder. On January 26 and 27, 1987, the trial court conducted an aggravation/mitigation hearing. At the conclusion of the evidence, the trial court stated that he found beyond "any doubt" that petitioner had fired the shot that resulted in the death of Thomas Powell. The trial court, after considering the mitigating circumstances, found two aggravating circumstances -- that the crime was committed in an extremely heinous, cruel or depraved manner, and for pecuniary gain. The trial court determined that the mitigating circumstances did not call for leniency and, therefore, ordered that petitioner be committed to the Department of Corrections to be put to death.

REASONS FOR GRANTING THE WRIT

In Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), pet. for cert. pending, Ricketts v. Adamson, No. 88-1553 (U.S., filed Mar. 20, 1989), the Ninth Circuit Court of Appeals held the Arizona death penalty unconstitutional for the reasons argued in the instant petition. In State v. Vickers, ___ Ariz. ___, ___ n.2, 768 P.2d 1177, 1188 n.2 (1989), the Arizona Supreme Court respectfully refused to follow the Ninth Circuit's opinion. Until this conflict is resolved in its entirety by this Court, the status of the law is in hopeless deadlock. Therefore, respondent agrees with petitioner that this Court should grant the instant petition for writ of certiorari, but contends that the Arizona Supreme Court's holding should be affirmed for the following reasons.

I. Arizona's death penalty statute does not violate the Sixth Amendment by denying a jury trial on aggravating circumstances necessary for the imposition of death.

This Court has said that there is no one right way for a state to set up its capital sentencing scheme. Spaziano v. Florida, 468 U.S. 447, 464 (1984). In Adamson v. Ricketts, the Ninth Circuit disagreed finding that because aggravating circumstances determine eligibility for the death penalty, they are elements of a higher offense, "capital murder," and must be determined by a jury at the guilt phase. 865 F.2d at 1017-29. The Ninth Circuit's opinion on this issue is contrary to this Court's holding in Hildwin v. Florida, No. 88-6066 (U.S., May 30, 1989). In Hildwin, the defendant argued that the Florida death penalty statute was in violation of the Sixth Amendment right to a jury trial because it permitted the imposition of death without the jurors' finding the existence of aggravating circumstances. This Court rejected the defendant's conclusion stating:

> [T]he requirement that the findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."

Id., slip op. at __ (citation omitted).

The Florida and Arizona death penalty statutes are similar in that both require the trial judge, not the jury, to find the existence of aggravating factors. As Adamson v. Ricketts, and the arguments made by petitioner, cannot be reconciled with this Court's opinion in Hildwin, the petition for certiorari should be granted and the Arizona Supreme Court's decision affirmed on this issue.

. . . .

. . . .

II. The Arizona death penalty statute does not violate the Eighth and Fourteenth Amendments by requiring the trial court to impose the death penalty if it finds that the defendant has failed to prove the existence of mitigating evidence sufficient to call for leniency.

By statute, the defendant in Arizona has the burden of producing mitigating evidence. Ariz. Rev. Stat. Ann. § 13-703(C). Arizona requires that the defendant prove by a preponderance of affirmative evidence the existence of what he asserts. State v. Leslie, 147 Ariz. 38, 49, 708 P.2d 719, 730 (1985); State v. Harding, 137 Ariz. 278, 292, 670 P.2d 383, 397 (1983), cert. denied, 465 U.S. 1013 (1984); State v. Greenawalt, 128 Ariz. 150, 173, 624 P.2d 828, 851, cert. denied, 454 U.S. 882 (1981). The statute in no way limits the presentation of potential mitigation, but it does require that after the state has proven aggravation, the defendant produce substantial mitigation to avoid the death penalty. Ariz. Rev. Stat. Ann. §§ 13-703(E) and (G). In Adamson v. Ricketts, the Ninth Circuit conceded that Arizona may require the defendant to produce mitigation, but objected to the preponderance standard. 865 F.2d at 1039-44. The Ninth Circuit has, however, upheld a Montana statute that required the defendant to prove the substantiality of mitigation. Coleman v. Risley, 839 F.2d 434, 445-48 (9th Cir. 1988).

This Court has sustained statutes requiring the defendant to prove, at the guilt phase, affirmative defenses such as insanity, self-defense, and extreme emotional disturbance by a preponderance of the evidence and, in one case, beyond a reasonable doubt. Martin v. Ohio, 480 U.S. 228 (1987); Patterson v. New York, 432 U.S. 197 (1977); Rivera v. Delaware, 429 U.S. 877 (1976); Leland v. Oregon, 343 U.S. 790 (1952). In view of these cases, a

statute that requires a convicted defendant to prove an "affirmative defense" of mitigation by establishing the truth of what he asserts by a preponderance of the evidence does not violate the Constitution. Respondent agrees that any fact constituting relevant mitigation must be weighed; but this Court has never said that the sentencer must accept bare assertions as fact. For instance, if a defendant states that for 20 years he has supported his invalid mother, but he can offer no proof of his assertion, a sentencer should not be required to accept the bare assertion as a fact, and give to it mitigating weight. Even where the defendant proves his allegations, the sentencer does not have to agree that they constitute mitigation. Raulerson v. Wainwright, 732 F.2d 803, 807 (11th Cir. 1984).

The Ninth Circuit also found the Arizona statute flawed because it imposed a "presumption of death" when it required the defendant to produce substantial mitigation to warrant leniency. Id.[1] The court relied on the cases of Sumner v. Shuman, 483 U.S. 1002 (1987), Roberts v. Louisiana, 428 U.S. 325 (1976), and Woodson v. North Carolina, 428 U.S. 280 (1976). The statutes struck down in those cases, however, required death upon conviction of a specified offense. Contrary to the Arizona statute, those statutes did not permit consideration of mitigation. Clearly, there is not a "presumption of death" under the Arizona statute, as upon conviction the prosecution must

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1. This Court presently has before it similar contentions in Blystone v. Pennsylvania, No. 88-6222, cert. granted, 57 U.S.L.W. 3635, and Boyde v. California, No. 88-6613, cert. granted, ___ U.S.L.W. ___ (June 5, 1989).

prove at least one aggravating circumstance beyond a reasonable doubt, or death may not be imposed. Ariz.Rev.Stat.Ann. § 13-703. Likewise, if the state is successful in proving an aggravating factor, a defendant may show mitigation and thereby obtain a life sentence.

Respondent believes that the Ninth Circuit's conclusion that a defendant cannot be required to produce substantial mitigation is a misunderstanding of what this Court meant by "discretion" in previous cases. This Court struck down the death penalty in Furman v. Georgia, 408 U.S. 238 (1972), because there were no guidelines to channel the sentencer's discretion and death was so infrequently imposed that it appeared capricious. Gregg and Proffitt said that aggravating factors could be used to channel the sentencer's discretion. The purpose of proving aggravation is to persuade the sentencer that death is the appropriate penalty. If the state has proved aggravation, and the defendant produces no mitigation or insufficient mitigation to counter the aggravation proved by the state, the Constitution should not demand that the sentencer have unbridled discretion to impose life. Such unbridled discretion would be just as capricious as the practice condemned in Furman, because it allows one who deserves death to escape it for reasons unrelated to relevant mitigation. By requiring the imposition of death if aggravation is proved and there is no substantial mitigation, the Arizona statute avoids the capriciousness condemned in Furman by assuring that those who deserve death will not escape it for improper reasons, such as the sentencer's philosophical opposition to the penalty. State v. Beaty, 158 Ariz. 232, 246-47, 762 P.2d 519, 533-34 (1988).

In California v. Brown, 479 U.S. 538 (1987), this Court held that it was proper to instruct jurors not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in deciding the sentence. The Court noted that neither Brown nor the California Supreme Court contended that such factors, unrelated to relevant mitigation, should play any role in the sentencing determination. Id. at 542. If the Constitution permits the instruction given in Brown, then the Constitution does not require that the sentencer be allowed to impose life capriciously when the defendant cannot produce relevant or substantial mitigation.

Franklin v. Lynaugh, ___U.S.___, 108 S. Ct. 2320 (1988), reexamined the statute upheld in Jurek v. Texas. The Court noted that Lockett did not say that the state has no role in structuring the sentencer's consideration of mitigation. ___ U.S. at ____, 108 S. Ct. at 2330. In Texas, if the jury answers two -- sometimes three -- questions affirmatively, the statute requires the death penalty. Franklin argued that even if the jurors had answered the special questions affirmatively, they were still entitled to cast an "independent" vote against the death penalty. This Court said that the defendant's argument had been foreclosed by Jurek. Id. The Texas statute does not give the sentencer discretion to impose life in spite of affirmative answers to the aggravating questions. If the Texas procedure is constitutional, so is Arizona's.[2]

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2. Concurring in the judgment, Justice O'Connor noted that the sentence should reflect a reasoned moral response to the defendant's background, character and crime:

> Nothing in Lockett or Eddings requires that the sentencing authority be permitted to give effect to evidence beyond the extent to which it is relevant to the defendant's character or background or the circumstances of the offense. Lockett, supra 438 U.S. at 604, n. 12, 98 S.Ct., at 2965, n. 12 . . . .

108 S.Ct. at 2333.

III. The aggravating factor of "especially heinous, cruel or depraved" has been sufficiently defined to satisfy the requirements of Maynard v. Cartwright.

In Adamson v. Ricketts, the Ninth Circuit found Arizona's aggravating circumstance of especially heinous, cruel or depraved unconstitutional on its face. Id. at 1031-39. In Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1987), the same court considered an identical challenge and rejected it. Another panel, in Woratzeck v. Ricketts, 820 F.2d 1450, 1459 (1987) [remanded for reconsideration in light of Maynard v. Cartwright, ____U.S.____, 108 S. Ct. 1853 (1988)], concluded that the presumption of correctness under 28 U.S.C. § 2254(d) should be accorded the state court's findings of fact when considering a challenge to aggravating circumstances.

This Court said in Barclay v. Florida, 463 U.S. 939, 947 (1983), that federal review of such circumstances is limited to whether they are so "unprincipled or arbitrary as to somehow violate the United States Constitution." In Maynard v. Cartwright, this Court found an Oklahoma statute unconstitutional because: (1) there were no instructions to the jurors about what the terms meant; and (2) the Oklahoma Criminal Court of Appeals appeared merely to survey the facts to see whether the circumstance existed, without saying what factors must be present to sustain it. In contrast to the Oklahoma procedure, the Arizona Supreme Court has defined the terms, and has specifically said what facts must be present to establish them. Furthermore, in Arizona the trial court imposes the sentence.

1. Evolution of the Circumstance

Instead of attempting a comprehensive description of factual situations that would fall within the parameters of

this circumstance, the Arizona Legislature deferred to the Arizona Supreme Court. This Court has recognized that judicial construction of a statute may render it constitutional. Gregg v. Georgia; Proffitt v. Florida. The definitions of the terms -- especially heinous, cruel, or depraved -- may be conceived as three circles. The legislature chose to let the Arizona Supreme Court fill in those circles. Naturally, this is an evolutionary process. Therefore, given the limitations of language, a court necessarily begins with dictionary definitions and fleshes out the various factual situations as they present themselves. That is precisely what the Arizona Supreme Court did:

> heinous: hatefully or shockingly evil: grossly bad.
>
> cruel: disposed to inflict plain esp. in a wanton, insinsate or vindictive manner: sadistic.
>
> depraved: marked by debasement, corruption, perversion or deterioration.

State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, 435 U.S. 908 (1978). In Knapp, the Arizona Supreme Court stated that the legislature intended to include killings where additional circumstances "set the crime apart from the usual or the norm." Id. Recognizing that every murder in a certain sense may be characterized as heinous, cruel, or depraved, that court has required that the facts show it to be especially heinous, cruel, or depraved. State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979).

2. Especially Cruel

By the time the Arizona Supreme Court handed down State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, cert. denied, 461 U.S. 971 (1983), it had reviewed a sufficient number of

cases to crystalize the requirements to establish each prong of the circumstance. The court explained that "especially cruel" would be satisfied only when the prosecution proved beyond a reasonable doubt that the victim had consciously suffered mental anguish or physical pain prior to death. Id. at 51, 659 P.2d at 12. Those requirements have been consistently applied. State v. Vickers, ___ Ariz. ___, 768 P.2d 1177 (1989) (cruelty established where the defendant threw flaming liquid upon the conscious victim, who vainly ran around his cell trying to extinguish the flames until he died); State v. Fulminante, 11 Ariz. Adv. Rep. 7, 19-21 (June 16, 1988) (mental anguish established where the defendant beat and tortured an 11-year-old girl and made her beg for mercy before shooting her); State v. Beaty, 158 Ariz. 232, 237, 242, 762 P.2d 519, 524, 529 (1988) (mental anguish established where the terrified victim vomited while the defendant held his hand over her mouth prior to raping and murdering her); State v. (Walter) LaGrand, 153 Ariz. 21, 36-37, 734 P.2d 563, 578-79 (1987) (mental anguish and physical pain demonstrated where the defendant bound, gagged, and threatened the bank manager with death, then inflicted 24 stab wounds with a letter opener); State v. Castaneda, 150 Ariz. 382, 393, 724 P.2d 1, 12 (1986) (mental anguish and physical pain established by proof that the defendant repeatedly sodomized a 12-year-old boy, drove him to the desert, forced him to remove his clothes, then stabbed him four times in the chest as he pled for his life, leaving him writhing in pain on a red ant hill).

Only a few months after Gretzler, the Arizona Supreme Court decided State v. Adamson. In Adamson, it introduced a new requirement that narrowed the application of the

circumstance: The defendant must either intend to inflict mental anguish or physical pain, or reasonably foresee that he will inflict it. 136 Ariz. 250, 266, 665 P.2d 972, 988, cert. denied, 464 U.S. 865 (1983). As the dissent recognized in Adamson v Ricketts, there has been no post-Adamson case where this circumstance has been sustained without evidence that the defendant either intended to inflict anguish or physical pain, or reasonably foresaw that he would do so.

3. Especially Heinous or Depraved

Contrasted to cruelty, these elements focus upon the defendant's attitude and mental state, as reflected in his words or actions, at or near the time of the murder. State v. Ceja, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980). Gretzler listed the factors: (1) relishing the murder; (2) infliction of gratuitous violence upon the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; (5) helplessness of the victim. Neither of the last two elements, in isolation, would necessarily lead to the application of the circumstance. 135 Ariz. at 51-53, 659 P.2d at 10-12. The Arizona Supreme Court has consistently applied these factors. State v. LaGrand (infliction of gratuitous violence and needless mutilation, plus the senselessness of the killing and the helplessness of the victim); State v. Wallace, 151 Ariz. 362, 366-68, 728 P.2d 232, 236-38 (1986) (infliction of gratuitous violence after the victims had collapsed, decision to use a baseball bat and pipe wrench in spite of possession of a loaded revolver, and the total senselessness of killing three people with whom he had lived 2 years as a family); State v. Rossi, 146 Ariz. 359, 365, 706 P.2d 371, 377 (1985) (defendant used special bullets designed to make

bigger holes, subsequently bragged about the murder, and gave a friend three spent bullets as souvenirs).

4. As Applied to Petitioner

Petitioner does not dispute that the Arizona Supreme Court applied the above-cited standard to him, but claims that in other cases, arguably similar, the state supreme court did not find the aggravating circumstance. The reasons for the Arizona Supreme Court's factual determinations in other cases are not of constitutional scope and are beyond this Court's ability to review. Petitioner is only entitled to a standard that is not vague. The fact that other fact-finders may not reach the same conclusion on similar facts is irrelevant.

CONCLUSION

Respondent prays that for the reasons stated herein that the petition for writ of certiorari will be granted, and that the Arizona Supreme Court's decision affirmed on the issues presented.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

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Attorneys for RESPONDENT

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

PAUL J. McMURDIE, being first duly sworn upon oath, deposes and says:

That he served the attorney for the petitioner in the foregoing case by forwarding three (3) copies of BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

DENISE I. YOUNG
Arizona Capital Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604
Attorney for PETITIONER

this 16th day of June, 1989.

Paul J. McMurdie

PAUL J. McMURDIE

SUBSCRIBED AND SWORN to before me this 16th day of June, 1989.

Janet E. Dyer

JANET E. DYER
NOTARY PUBLIC

My Commission Expires:

December 10, 1989

9873d jd